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BEFORE THE INTEGRATED WASTE MANAGEMENT BOARD
OF THE STATE OF CALIFORNIA

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In the Matter of:) Appeal of Decision by
Wayne Fishback,) Ventura County Hearing
) Officer Affirming Cease and
Appellant,) Desist Order Issued May 11,
) 2006, by Ventura County
vs.) Environmental Health
) Division as the Local
Ventura County Environmental) Enforcement Agency
Health Division, Local)
Enforcement Agency,)
) Public Resources
Respondent.) Code § 45030
=====)

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

WEDNESDAY, DECEMBER 6, 2006

2:08 P.M.

AT THE

CALIFORNIA INTEGRATED WASTE MANAGEMENT BOARD

JOE SERNA, JR., CALEPA BUILDING

1001 I STREET

2ND FLOOR

COASTAL HEARING ROOM

SACRAMENTO, CALIFORNIA

--o0o--

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BOARD MEMBERS

Ms. Margo Brown, Chairperson

Mr. Jeffrey Danzinger

Ms. Rosalie Mul

Ms. Cheryl Peace

Mr. Gary Petersen

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FOR THE INTEGRATED WASTE MANAGEMENT BOARD

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ALSO PRESENT

Mr. Todd Doherty

Mr. George Eowan

Mr. Wayne Fishback, Appellant

Mr. Robert Mionske

Mr. Darrell Siegrist, County of Ventura

Mr. William C. Stratton, County of Ventura

INDEX

	PAGE
Call to Order	1
1. Acceptance or Rejection of the Appeal	
A. Board staff presentation and recommendation	2
B. Announcement of Board decision	4
2. Does the appeal include the hearing officer issue?	
A. Appellant presentation	5
B. LEA presentation	12
C. CIWMB staff presentation	19
D. Closed session	28
E. Announcement of Board decision	29
3. Presentations regarding Appellant's contention that items are missing from the Administrative Record	
A. Appellant presentation	30
B. LEA presentation	37
C. CIWMB staff presentation	49
D. Public testimony	54
E. Closed session	60
F. Announcement of Board decision	61
Adjournment	61
Reporter's Certificate	62

1 PROCEEDINGS

2 CHAIRPERSON BROWN: Good afternoon. Today this is
3 a public hearing for the appeal of the Ventura County
4 hearing officer decision regarding a Cease and Desist
5 Order issue to Wayne Fishback.

6 Kristen, can you call the roll.

7 EXECUTIVE ASSISTANT GARNER: Danzinger?

8 MEMBER DANZINGER: Here.

9 EXECUTIVE ASSISTANT GARNER: Mulé?

10 MEMBER MULÉ: Here.

11 EXECUTIVE ASSISTANT GARNER: Peace?

12 MEMBER PEACE: Here.

13 EXECUTIVE ASSISTANT GARNER: Petersen?

14 MEMBER PETERSEN: Here.

15 EXECUTIVE ASSISTANT GARNER: Brown?

16 CHAIRPERSON BROWN: Here.

17 Thank you.

18 Before we can get to a hearing on the merits of
19 the appeal, we have several procedural matters which must
20 be decided. Once we make a decision regarding those
21 matters, we will need to determine how the remainder of
22 the appeal will be heard. The Board members and parties
23 have each received a document entitled "Schedule of
24 Presentation," which outlines our process for today.
25 Copies have also been placed at the back table.

1 Depending on the decisions that we reach on the
2 procedural issues, the Board may not -- may not be hearing
3 the merits of the appeal today.

4 However, I understand some members of the public
5 are here and wish to address the Board. I would like to
6 request that you fill out a speaker slip at the back and
7 ask that they been brought forward, and we may or may not
8 be able to hear that testimony today, depending on time.

9 The first procedural issue to be decided is
10 whether or not to accept or reject the appeal, because the
11 appeal raises substantial issues. Michael Bledsoe of our
12 legal office will be making a presentation and recommend
13 on this issue.

14 Board members will be able to ask questions of him
15 and of the party representatives. And then we can make a
16 decision regarding this issue.

17 We will have the option to adjourn to a closed
18 session for discussion, prior to making a decision, if the
19 Board members feel that we need to have a more candid
20 discussion on this issue.

21 Now I will turn it over to Michael Bledsoe.

22 STAFF COUNSEL BLEDSOE: Thank you, Madam Chairman.
23 Michael Bledsoe speaking on behalf of the staff today.

24 The fundamental question that Mr. Fishback raises
25 in this appeal is whether the use over a period of years

1 of substantial quantities of dirt, concrete, stucco, and
2 brick, obtained from construction sites, for purposes of
3 erosion control, in accordance with local ordinances
4 constitutes the disposal of solid waste for which a permit
5 is required or whether that is an activity that requires
6 some other regulatory oversight by the LEA, the local
7 enforcement agency, pursuant to the Integrated Waste
8 Management Act.

9 Staff believes that this appeal raises substantial
10 issues under Public Resources Code Section 45031(a).
11 Essentially, it goes to the question of how our, the
12 Board's, construction and demolition debris and inert
13 debris regulations apply to the use of so-called type A
14 inert debris when it is used for erosion control in
15 compliance with local ordinances. Among the issues the
16 appellant raises are whether such inert debris is, quote,
17 solid waste, closed quote, subject to Board regulation,
18 whether his use of the inert debris is, quote, disposal,
19 closed quote; and thereby, in whether the C&D regs and
20 inert debris regs apply to his activity at all.

21 We believe these are substantial issues and
22 recommend that the Board hear the appeal.

23 CHAIRPERSON BROWN: Thank you.

24 Any Board members have any questions?

25 Does any Board member feel that we need any time

1 for deliberation? Or may I recommend we go to voting on
2 this issue?

3 Kristen, the issue before the Board is whether to
4 hear the appeal on the Ventura County hearing officer
5 decision on the Fishback appeal.

6 EXECUTIVE ASSISTANT GARNER: Danzinger?

7 MEMBER DANZINGER: Aye.

8 EXECUTIVE ASSISTANT GARNER: Mulé?

9 MEMBER MULÉ: Aye.

10 EXECUTIVE ASSISTANT GARNER: Peace?

11 MEMBER PEACE: Aye.

12 EXECUTIVE ASSISTANT GARNER: Petersen?

13 MEMBER PETERSEN: Aye.

14 EXECUTIVE ASSISTANT GARNER: Brown?

15 CHAIRPERSON BROWN: Aye.

16 Thank you.

17 Okay. Now, our second procedural issue to be
18 decided is whether or not the appeal includes the issue of
19 the appropriateness of the appointment of the hearing
20 officer.

21 Each party will have ten minutes to make a
22 presentation on this issue. Mr. Fishback's representative
23 will go first, followed by the LEA's representative,
24 followed by Board staff's representative.

25 Board members may ask questions at any time. Once

1 the presentations are completed, the Board members will
2 then adjourn to deliberation on this particular issue.

3 So I will move first to Mr. Fishback's
4 representative.

5 MS. NEISWENDER: Thank you, Madam Chair.

6 My name Kate Neiswender. I'm an attorney
7 representing Mr. Fishback, who's seated next to me. And
8 also, at the end of the table, Mr. Eowan, who I understand
9 you know quite well.

10 The hearing officer issue is a very problematic
11 one for us. Let me start out with the code itself.
12 Public Resource Code 45032 states that by law, you are
13 empowered to hear any relevant evidence that, in the
14 judgment of the Board, should be considered to effectuate
15 and implement the policies of the Waste Act.

16 Whether or not a hearing officer was appropriately
17 named and appropriately should have heard this appeal is
18 certainly something that is within the ambit of 45032.

19 The request of whether the County had set up a
20 valid appellant procedure is the first question that must
21 be asked, I think, in any appeal. Not only this one, but
22 every one. And it's perhaps the most important because it
23 involves very basic questions of due process.

24 The Act sets forth the procedure for an appeal; it
25 is specifically in Section 44308. And if we go through

1 that section, it becomes fairly clear how it should have
2 been set up.

3 First of all, in Subdivision A, all the hearings
4 are supposed to be by a hearing panel. Now the Ventura
5 County LEA had a hearing panel up until April of this
6 year, and, in fact, did not disband that hearing panel
7 until after the LEA had decided to pursue the situation
8 with Mr. Fishback, and it was clear we would appeal any
9 ruling that was made that was adverse.

10 So immediately, upon discovering that, the hearing
11 panel was disbanded, and Mr. Delperdang, a single hearing
12 officer, was appointed.

13 Under 44308(a)(1), in a hearing panel situation,
14 the board of supervisors can act that they appoint three
15 of its members to act as the hearing panel. In (a)(2),
16 the alternative is that the board chair can appoint an
17 independent hearing panel. As I said, that's what we had.

18 And then 44308(b), Subsections 1 through 6, talk
19 about what's important: Independent hearing panel has to
20 be -- has to have waste experience; at least one member is
21 supposed to be a representative of the public at large; at
22 least one member shall be a technical expert with
23 knowledge of solid waste management methods and
24 technology; members of the independent hearing panel are
25 supposed to be selected for their legal, administrative,

1 or technical abilities in areas relating to solid waste
2 management.

3 And our hearing panel of Ventura County, before it
4 was disbanded, had just those kinds of qualifications. I
5 mean, it was excellent.

6 Now, Mr. Delperdang has no expertise in waste
7 management at all, period, none. No technical expertise,
8 no engineering, nothing.

9 Now, Subdivision B of 44308 -- excuse me, D, was
10 recently added. It allows for the appointment of a single
11 hearing officer. And as of today in the state of
12 California, there are only two jurisdictions with such a
13 hearing officer: At Sacramento, which chose to utilize
14 a -- the administrative law judge; and Tulare, in which
15 they appointed someone with significant waste management
16 experience.

17 Ventura has Mr. Delperdang. On his resume, it
18 states that he is the enforcement officer for the entire
19 Resource Management Agency.

20 In Ventura County, as is common in many counties,
21 you have an umbrella organization, and that, in this
22 County, is the Resource Management Agency. Underneath
23 that umbrella, which is run by one person, named Chris
24 Stevens, Stevens oversees these other departments. Those
25 departments are Planning, Building Safety, Public Works,

1 Environmental Health Division, and Weights and Measures.

2 Mr. Delperdang runs Weights and Measures. So he's
3 under Stevens. He's also listed, on his resume, as the
4 enforcement officer for the entire RMA, for the entire
5 Resource Management Agency.

6 So essentially what has happened here is that the
7 LEA issued an order, and the enforcement officer -- that
8 order would have been issued under Delperdang's authority
9 as enforcement officer for the RMA and then he ends up
10 being the appellant panel, the hearing officer for his own
11 order, for an order issued under his own authority.

12 That in itself, if not wholly improper, does
13 provide an appearance of impropriety that cannot be
14 ignored.

15 Under another section of the Public Resources
16 Code, 45031(d), this Board is authorized to hear any issue
17 that it chooses, that is relevant to the integrity of the
18 Waste Act, and to set a hearing within 60 days on the
19 merits of that appeal. And that's what we're asking for
20 today, on this issue.

21 There's another issue that has to be brought up,
22 not just the fact that we shouldn't have had a single
23 hearing officer without any experience in waste
24 management, but rather one under the same section, 44308,
25 in which the propriety of having a hearing panel that is

1 independent becomes critical.

2 Under the regulations, 18081(e), if a county
3 operates a solid waste facility, it shall -- not "may,"
4 but "shall" operate an independent hearing panel.

5 Now, that particular code section reads, "When in
6 the jurisdiction of the EA, there exists a publicly owned
7 or operated solid waste facility, the local governing body
8 shall maintain an independent hearing panel for permit,
9 enforcement, and appeal purposes."

10 Therefore, because the Ventura County Board of
11 Supervisors operates a couple of waste dumps, including
12 the Piru Dump, which has had a number of violations, the
13 guidelines seem to mandate an independent hearing panel.
14 And I've got to go back to the fact that we had one: It
15 was well-suited, good people on it, wasn't a problem. And
16 only for the purposes of this appeal was that body
17 disbanded and Mr. Delperdang appointed.

18 We also have this other issue that's hanging out
19 there that I really have to emphasize. The Code says,
20 very specifically, that the governing body has to appoint
21 a hearing officer. The governing body, not the LEA. The
22 governing body is defined as the board of supervisors.
23 The Board never looked at this issue. The board did not
24 appoint Mr. Delperdang. The board did not set up a
25 procedure for the appointment of Mr. Delperdang or list of

1 his qualifications, all of which is in the code. They
2 have to have adopted procedures for making the appointment
3 and qualifications that the hearing officer is to meet.
4 That's not there. The Board of Supervisors of Ventura
5 never looked at this issue.

6 Your body, your board, approved the appointment of
7 Mr. Delperdang based on the recommendations and
8 representations of a Ventura County LEA. And I would
9 suggest to this Board that you were mislead as to the
10 efficacy of that appointment. They did not do what they
11 were supposed to do. We discovered this very late in the
12 process, because I assume that a governing body is going
13 to do what it's supposed to do under the law. I assume
14 that the County is going to do what it's supposed to do,
15 what it's mandated to do by the Code and regulations.

16 I never thought, until very late in the process,
17 to look up the qualifications of Mr. Delperdang and the
18 method and manner of his appointment.

19 Now, the County has suggested that this board
20 should not hear this issue. The County has suggested that
21 we did not raise it at the administrative level. And that
22 is simply not true.

23 At the very first hearing for this matter, which
24 happened, I believe, in June of 2006, Mr. Delperdang said
25 that he was represented by an independent attorney, a man

1 who's not a County employee, named Dennis McNulty.
2 McNulty is actually a private attorney that apparently was
3 brought in for the purpose of representing the hearing
4 officer at the hearing.

5 When we raised the hearing officer issue -- as an
6 attorney, you don't talk to the party if they are
7 represented, even in a hearing officer situation. You
8 write to their counsel. That's just standard practice, at
9 least in my industry.

10 So I write a letter to Mr. McNulty and I say, "We
11 have a problem. This is our problem: We don't think that
12 you are empowered to hear this, and we raise the question
13 of hearing panel versus hearing officer."

14 McNulty wrote back, and he said, "No. We looked
15 at this. We think it's proper." And he copied, on that,
16 Mr. Delperdang and Mr. Stratton. And those letters are
17 before you. I believe they are in the packet that was
18 prepared on this single issue.

19 The County has suggested that wasn't good enough,
20 that because we did not raise this at the hearing itself
21 or raise this to Mr. Delperdang in person, that we don't
22 have a right to hear this issue. And this is, I think,
23 indicative of how the County has handled this project from
24 the very beginning. It is a misreading of what is
25 supposed to be an administrative record. And it is a

1 misreading of whether or not an issue was validly raised,
2 and I would suggest that it is not valid for many reasons,
3 not the least of which was, there is no question about Mr.
4 McNulty's participation. He was sitting next to Mr.
5 Delperdang at the hearing. He participated in the
6 hearing. He gave advice to the hearing officer during the
7 hearing. He was clearly the hearing officer's counsel.

8 We have tried to resolve this by going to the
9 County and suggesting that a hearing panel should be
10 appointed. The County has turned us down on this issue,
11 and now we have brought this issue before you.

12 Because of what it says in 44308 and because of
13 what it says in the guidelines, at 18801(e), we believe
14 that the only thing that is possible to do in this
15 situation is to set this matter for a hearing and make a
16 final and fair determination as to whether or not the
17 County acted appropriately.

18 If I have time left over, which I believe I do, I
19 would like to reserve at least some of that for rebuttal.

20 CHAIRPERSON BROWN: I'm not keeping a stopwatch,
21 but we're at about ten minutes.

22 But let's go forward. LEA's representative.

23 MR. KWONG: Good afternoon, Madam Chair Brown and
24 members of the Integrated Waste Management Board.

25 My name is Robert Kwong. I'm an assistant county

1 counsel for the County of Ventura, representing the
2 County's Environmental Health Division, which is the local
3 enforcement agency under the Integrated Waste Management
4 Act for the County.

5 I would like to organize my remarks in reverse
6 order to what you just heard from the appellant's counsel,
7 because it's the last things that she said that were more
8 important than the first things. The last things that she
9 said really did talk about the issue that's before you,
10 whether or not the hearing officer's appointment was
11 properly preserved at the hearing officer hearing level so
12 that it is properly before you now.

13 What she did in the first part of her argument was
14 argue the merits of the underlying issue, which is whether
15 or not the hearing officer was properly appointed. We're
16 not even there yet. So the question is very narrow and
17 it's very procedural.

18 And I know that this is very legalistic, and
19 you're sitting here as a quasi-judiciary body. And so
20 sometimes the legal profession and how it goes about doing
21 its business can be befuddling. But what I'm here to tell
22 you, as a Board, is that fairness and the proper reading
23 of the law demand that this issue not be before you, and
24 that the right thing to do is to rule against the
25 appellant's request to have the hearing officer issue

1 before you.

2 I would like to start by referring to a document
3 that your chief counsel put together, dated December 1st,
4 2006, on this very issue.

5 And at the very end of that two-page document,
6 there are five bullet points. And those five bullet
7 points are extremely telling in this matter, because it
8 sets forth the clear facts that you need to make a good
9 decision and what a good decision can be based upon. And
10 I'm going to read those for the record:

11 Number one, the first bullet: "Appellant
12 exchanged correspondence with the attorney for the hearing
13 officer on this issue while the hearings were being
14 conducted.

15 "August 2nd, 2006, a letter to McNulty and a
16 responding letter from McNulty dated August 18th, 2006."

17 None of those letters were sent to the LEA.

18 That fact alone underscores the fact that whatever
19 argument they are making, that this issue was raised in
20 June, is not the case.

21 Second bullet: "Appellant's briefs did not raise
22 this issue."

23 There was abundant briefing in this matter. And
24 you have a very large record, over 1200 pages long. And
25 there were many opportunities for the appellant to raise

1 this issue in the briefing. Not a single document offered
2 by the appellant raises this issue before the hearing
3 board or for the LEA's consumption, analysis, or response.

4 Third, "There's no mention of this issue in the
5 transcripts of the hearing."

6 We have a transcriber here today, a court
7 reporter, for the very purpose of maintaining a clear,
8 clean, and consistent record.

9 That was also done before the hearing officer.
10 Every word was taken down. Not a single word uttered by
11 the appellant, appellant's representatives, or the
12 appellant's attorneys mentioned the hearing officer's
13 appointment, his authority, or his ability to hear this
14 hearing. Not a single word.

15 Fourth bullet: "The hearing officer decision does
16 not mention this issue."

17 Assuming it was raised, the hearing officer is
18 duty-bound to respond to that foundational issue. It's a
19 threshold issue: Can I sit and hear this matter? And he
20 has to overcome that threshold issue before he can rule on
21 whether or not the cease and desist order was properly
22 issued. It's not mentioned in his decision because it
23 wasn't before him.

24 Fifth bullet: "The letter to the Board appealing
25 the hearing officer decision did not mention this issue."

1 This is the appeal that they are taking of the
2 hearing officer's actions, and they don't even mention it
3 in that appeal. And that was -- that was a letter dated
4 October 5, 2006. That's in the record, but there's no
5 evidence in that appeal, to your board, that they are
6 raising this hearing officer issue.

7 Let me turn now to the statutes that guide your
8 Board's appeal and your jurisdiction. 45030 clearly
9 states the grounds upon which an appeal can be taken. It
10 says that it can be taken on a written decision by a
11 hearing panel or a hearing officer or upon other grounds,
12 none of which are applicable here.

13 I make that point very clearly in my letter, that
14 Mr. Block had requested that the individual parties to
15 write, on this very issue.

16 That leads me to my next point, which is that
17 there's a failure to preserve the issue, failure to
18 exhaust administrative remedies. It's a very simple
19 process of administrative exhaustion, whereby you preserve
20 issues so that if you have a problem with the decision
21 that it was based upon, it can go on to the next level;
22 that it was fairly heard at that first level, then it can
23 move on to the next, so that another appellate body can
24 have the benefit of that analysis, response, and that
25 iteration and that argumentation. That was not done here.

1 And according to very well-established
2 administrative law, failure to exhaust is fatal to bring
3 that issue back again. Otherwise, rules go by the
4 wayside, and any issue that is raised, no matter how late
5 and no matter how irrelevant, can be raised at the next
6 level, creating a process, not the rule of law, but the
7 rule of expediency and the rule of pragmatism and the rule
8 of relativism.

9 That is not the process that we here in
10 California, let alone the United States, abide by. That's
11 not the rules that we play by down at the hearing officer
12 level. And that's not the rules that I think this board
13 should be embracing by the request of the appellant, at
14 this point in time.

15 I would also like to clarify a few things: One,
16 there was a lot of -- we were -- the County's been accused
17 of misstatements. Let me just clear the air, here, on a
18 couple of things:

19 The Board of Supervisors via Ordinance No. 4308
20 enacted provisions for the regulation of solid waste. In
21 that regulation, there is a section, 4701-14, called
22 "Hearing Officer." And it says, clearly, "Hearing officer
23 shall mean the person designated by the director" --
24 meaning the director of the Environmental Health
25 Division -- "to conduct hearings in accordance with

1 Section 4730 et seq." -- also of this ordinance here.

2 "The hearing officer may include any employee of the

3 County other than the investigating officer involved in

4 the particular proceeding or such officer's supervisor.

5 Where the general abatement procedure is applicable,

6 hearing officer shall mean the hearing officer appointed

7 to implement such procedure."

8 It is clear, by this ordinance language, that the

9 Board of Supervisors, as the governing legislative body

10 for the County of Ventura, took appropriate action by

11 ordinance, by resolution, by public hearing, by public

12 notice, to make certain that the hearing officer was

13 somebody that could be appointed through the delegated

14 authority to the -- to the director of the Environmental

15 Health Division.

16 So it's clear that the hearing officer had that

17 ability and that this was a proper appointment at the

18 County ordinance level.

19 Your statutes clearly indicate that it's a hearing

20 panel or a hearing officer. It can't be any more simple

21 than that.

22 So I want to put that issue to rest, that the

23 County somehow is flaunting law or acting improperly in

24 this matter.

25 I would also like to make the point that simply

1 making letters to the hearing officer's attorney does not
2 preserve that appeal -- or that issue on further appeal.

3 Again, I refer to my brief that I wrote, there,
4 that there is no exception to the exhaustion argument for
5 legal issues. And there can be no argument that it was
6 futile for her to raise this issue before the hearing
7 officer. And again, those -- the law that is governing
8 exhaustion of administrative remedies is clear that the
9 opposing side ought to have an opportunity to address it.
10 The County never was given a copy of that letter
11 indicating that this was an issue and we got it late,
12 after the fact.

13 So with all that being said, members of the Board,
14 I think that you have not only a solid factual basis upon
15 which to deny this appellant's request, but also a very
16 solid legal basis, not only at the state level, but also
17 at the local level, to deny this request.

18 Thank you.

19 CHAIRPERSON BROWN: Thank you, Mr. Kwong.

20 Mr. Bledsoe?

21 STAFF COUNSEL BLEDSOE: Thank you, Madam Chair.

22 I would like to start with, very briefly, taking a
23 look at Public Resources Code Section 44308, to be sure
24 that we're all on the same page.

25 I don't think that appellant's counsel read the

1 entire subdivision she cited.

2 Subdivision A says that "all hearings conducted
3 pursuant to this chapter by the enforcement agency shall
4 be conducted by a hearing officer appointed pursuant to
5 Subdivision D or a hearing panel, appointed pursuant to
6 either of the following procedures."

7 The statute says, "hearing panel or hearing
8 officer." It doesn't say you must have a hearing panel.

9 Subdivision D then goes on to say, "The governing
10 body of an enforcement agency may appoint a hearing
11 officer only if the governing body has adopted procedures
12 for making that appointment and has appointed" -- pardon
13 me, "and has adopted qualifications that the hearing
14 officer is required to meet."

15 If we were to get to the merits of this question,
16 we would testify -- our Board staff would testify that,
17 yes, Ventura County met those statutory standards. But we
18 are not on that substantive issue right now.

19 We are raising -- the question before you is
20 whether or not, as LEA counsel has stated, whether or not
21 that issue was properly preserved at the local level such
22 that it is properly part of the appeal before you. The
23 bottom line is that, no, it is not.

24 Appellant's council has cited no legal authority,
25 whatsoever, for her statement that that issue is properly

1 before you.

2 Counsel for the LEA has given you ample authority
3 for concluding that the issue is not properly before you.

4 So I would like -- just on that -- on that basis
5 alone, you should simply reject this request by appellant,
6 that issue -- she has not made a legal case as to why the
7 issue was properly before you.

8 But let me just hit a couple of further points
9 that show the authority for the alternative, which is that
10 the matter is not properly before you.

11 Appellant Fishback failed to raise this issue
12 during his appeal of the LEA cease and desist order. It
13 was not in their initial statement of reasons. That makes
14 sense, because they perhaps didn't figure it out until
15 later, during the appeal process itself. But they did not
16 bring it up during that appeal process. Writing a letter
17 to counsel for a hearing officer is not the same as
18 telling the judge, i.e the hearing officer, "Hey, Your
19 Honor, I've got a problem with your jurisdiction. The
20 County blew it. They didn't appoint you in the proper
21 manner. You're biased." Whatever the problem is, you
22 have to give that to the judge so he or she or, in this
23 case, the hearing officer, can rule. I mean, that's an
24 incredibly important legal issue, and they simply didn't
25 bring it up.

1 There -- we've looked at the transcripts. There's
2 no evidence that she raised the matter during the hearing.
3 I think if she had, she would probably be citing us to
4 pages of the transcript where she did raise that issue.
5 The matter is not submitted in the briefs submitted by the
6 parties.

7 Appellant's counsel's letter of August 2nd, where
8 she expresses concern about this issue, to the counsel for
9 the hearing officer, is not part of the record. Appellant
10 approved the record. So I mean, even those letters were
11 not in the record. And I guess I fail to see how, if this
12 were an issue she were -- that the appellant was concerned
13 about at the local level, they would have raised it in
14 some manner.

15 Then bringing the matter further up to the Board,
16 the question of whether the hearing officer had
17 jurisdiction was not in the statement of issues in the
18 request for hearing submitted by appellant to the Waste
19 Board. So never did she raise this issue until, you know,
20 later on in the process.

21 So I submit that there's no basis, whatsoever, for
22 our Board to consider this issue, the question of the
23 jurisdiction of the hearing officer. And if you should
24 elect to do that, then we're going to need to have a
25 separate issue to consider the merits of whether or not

1 the hearing officer did, in fact, have jurisdiction, and I
2 think that that would properly be done at the local level.
3 But the bottom line is, I don't think you have any basis
4 for considering that issue.

5 Thank you.

6 CHAIRPERSON BROWN: Thank you very much.

7 Elliot [sic] didn't use all his time. I can give
8 you two minutes. But I'm going to hold to the time,
9 because we would like to move this forward. And we will
10 go into closed session. So you have two minutes.

11 MS. NEISWENDER: Thank you.

12 First of all, claiming that we did not bring this
13 up during the hearing process is not a valid argument.
14 The first hearing on this matter occurred, I believe, in
15 July, and the second one in the end of August. And it was
16 during that period, between the two hearings, that we
17 realized what had happened and that we had an invalid
18 appointment for the hearing officer.

19 CHAIRPERSON BROWN: Can I ask you a question? Do
20 you have evidence of that -- because we're moving this
21 along.

22 Do you have evidence other than that you brought
23 it up?

24 MS. NEISWENDER: Yes.

25 BOARD CHAIRPERSON BROWN: In what manner?

1 MS. NEISWENDER: We sent the letter to the hearing
2 officer's lawyer, the person that had been designated, by
3 the County, as counsel for the hearing officer. And those
4 letters were provided to you. I mean, I have trouble
5 understanding how I could have preserved it better other
6 than to raise it at each and every point during the
7 hearing: show up before the hearing, during the hearing,
8 in a brief. I sent it in writing to the County.

9 In any other administrative hearing, whether it be
10 in a CEQA hearing -- I can quote you code sections on CEQA
11 because I know that inside and out. But in CEQA, which is
12 PRC 21167.5, they have a whole list of things that are
13 supposed to be included in an administrative record. And
14 that includes the files of the agency relating to the
15 project at issue.

16 In this particular situation, you think that the
17 files relating to this project would then be turned over
18 to the -- to this Waste Board. But instead, what happened
19 is that they omitted letters to the counsel, their
20 counsel.

21 CHAIRPERSON BROWN: Okay. I want you to keep to
22 the issue that we're discussing at this time. I asked one
23 question. And you answered it, yes. And I can give you
24 one minute further on the question of this particular
25 issue.

1 MS. NEISWENDER: Exhaustion of administrative
2 remedies, which is what Mr. Kwong was focused on, that
3 is -- that exhaustion requirement is only that I raise the
4 issue and that it is properly raised prior to a decision
5 on the matter.

6 Again, handing this over to Mr. McNulty designated
7 as the hearing officer's agent, as attorney in fact, is
8 sufficient to preserve that issue under the Administrative
9 Procedures Act.

10 Thank you.

11 CHAIRPERSON BROWN: Thank you. Any questions from
12 any board members at this time?

13 MEMBER PEACE: I guess I'm just wondering, if you
14 sent letters to Mr. McNulty about your concerns, about the
15 hearing officer, why wouldn't those have been forwarded to
16 the LEA? Why wouldn't he have given those to you? You
17 said you didn't have them.

18 MR. KWONG: The letters that Ms. Neiswender is
19 referring to were specifically addressed to Mr. McNulty
20 and were not CC'ed to the LEA or to the county counsel's
21 office, who is representing the LEA in the matter.

22 McNulty just responded directly to Ms. Neiswender,
23 and that's how that colloquy went as far as letters go.

24 I cannot speak for Mr. McNulty or the reasons why
25 he did not send us or CC us a copy of that letter.

1 MS. NEISWENDER: The CC is indicated on the
2 McNulty letter that it went to the LEA and to the hearing
3 officer. If you pull that letter from McNulty, it says,
4 "cc: Bill Stratton; cc: Jim Delperdang."

5 MR. KWONG: May I add one further point is that
6 because it was in the middle of the hearing and because of
7 the integrity of the process and not wanting to speak
8 directly with the hearing officer -- usually in those
9 situations, all parties are apprised of that type of
10 contact. Ms. Neiswender chose not to apprise us, us
11 meaning the LEA, or the county counsel's office of the
12 fact that she had raised this issue.

13 So in and of itself, that is suspect and a
14 questionable tactic to take there. But it comes back to
15 the question that Ms. Neiswender raised, properly raised.
16 She may have raised it, but was it proper?

17 And my answer is no, it was not proper, because
18 the parties were not fully apprised of what this issue was
19 and was not given an opportunity to speak to it. And so
20 therefore it was not properly preserved and it is not
21 properly before you.

22 Thank you.

23 MEMBER DANZINGER: I'm sorry. I don't know a lot
24 about what happened after that letter was sent.

25 Was there a public hearing subsequent to that

1 letter being sent, much like this, where you're there in
2 the room, with the hearing officer?

3 MS. NEISWENDER: Yes.

4 MEMBER DANZINGER: Okay. And so -- and subsequent
5 to the letter, it was not raised at any of the hearing
6 sessions that followed that?

7 MS. NEISWENDER: No. Mr. McNulty responded that
8 the issue was perceived by the hearing officer as not
9 being valid, and we went forward to the next hearing.

10 CHAIRPERSON BROWN: Do we have any other
11 questions?

12 MEMBER MULÉ: Mr. Kwong, could you reread
13 Section -- Ventura County Ordinance Section 4701-14 for
14 me?

15 MR. KWONG: I would be glad to.

16 Section 4701-14 of the Ventura County Ordinance
17 states that "the hearing officer shall mean the person
18 designated by the director" -- in this case, the director
19 is the director of the Environmental Health Division --
20 "to conduct hearings in accordance with Section 4730" and
21 following. That's another portion of this ordinance.

22 "The hearing officer may include any employee of
23 the county other than the investigating officer involved
24 in a particular proceeding or such officer's supervisor.
25 Where the general abatement procedure is applicable,

1 hearing officer shall mean the hearing officer appointed
2 to implement such procedure."

3 MEMBER MULÉ: Thank you very much.

4 CHAIRPERSON BROWN: Is a copy of the ordinance in
5 the record?

6 MR. KWONG: Yes, it is.

7 CHAIRPERSON BROWN: Can you give us a reference to
8 the page number?

9 MR. KWONG: The portion of the administrative
10 record that the ordinance is contained in is document 4,
11 the LEA's August 29th, 2006, reply, to the appellant's
12 brief. And it is Page 107. But it begins at 102, which
13 is the ordinance itself.

14 CHAIRPERSON BROWN: Okay. Thank you.

15 Do we have any other questions?

16 Okay. We will adjourn to closed session, at this
17 time, and return as soon as we have a decision on this
18 matter.

19 (The Board recessed into closed session.)

20 CHAIRPERSON BROWN: Thank you. Going back into
21 open session.

22 Kristen, can you call the roll?

23 EXECUTIVE ASSISTANT GARNER: Danzinger?

24 MEMBER DANZINGER: Here.

25 EXECUTIVE ASSISTANT GARNER: Mulé?

1 MEMBER MULÉ: Here.

2 EXECUTIVE ASSISTANT GARNER: Peace?

3 MEMBER PEACE: Here.

4 EXECUTIVE ASSISTANT GARNER: Petersen?

5 MEMBER PETERSEN: Here.

6 EXECUTIVE ASSISTANT GARNER: Brown?

7 CHAIRPERSON BROWN: Here.

8 On the matter of the appeal of the hearing officer
9 issue, we have determined this issue is not an issue that
10 has been brought properly before the Board as part of this
11 appeal. We will issue a written decision regarding this
12 decision subsequent to the hearing today.

13 So we will then move to the next appeal. The
14 third procedural issue to be determined is whether or not
15 the administrative record is missing relevant evidence,
16 and, if so, how the lack should be addressed.

17 Again the parties will have ten minutes to make a
18 presentation on this issue. Mr. Fishback's representative
19 will go first, followed by the LEA's representative,
20 followed by Board staff representative.

21 The Board may ask questions, again, at any time.
22 And we have two speakers who are here today that would
23 like to address the Board. And we will do that at the
24 conclusion of this part of the procedure, and then the
25 Board will adjourn to closed session for deliberation on

1 the third procedural issue.

2 So I also wanted to let people know, at the
3 request of Mr. Fishback's representative, a copy of your
4 letter has been provided to Board members by Mr. Block,
5 for their review, relevant to this matter. So we have got
6 a copy of your letter dated December 5th.

7 So ten minutes.

8 MS. NEISWENDER: Thank you. I will watch the
9 clock carefully, I promise.

10 Late last week, we received a staff report in this
11 matter via e-mail. In it, on Page 8, staff quotes the
12 LEA, saying, "It requested information from Mr. Fishback
13 on numerous occasions but did not receive the information
14 and Fishback failed to provide requested engineering
15 reports."

16 In addition, at Page 11 of that same staff, it was
17 noted that Phil Sherman, a civil engineer, was not a part
18 of the Fishback team until the summer 2006, after the
19 issuance of the cease and desist order.

20 If you put these two items together, it would
21 appear that Fishback did not have an engineer working with
22 him and failed to cooperate with the LEA concerning
23 engineering.

24 Nothing could be further from the truth.

25 The County prepared the administrative record in

1 this case, and they are the ones that excluded these
2 reports from that record. Fishback wrote a lot of letters
3 to the County and always provided information as
4 attachments. The attachments are noted in several
5 letters. And I will get to that in a moment.

6 I would like to digress just a moment and mention
7 that when we first discussed procedurally how to handle
8 this case, with Mr. Bledsoe and Mr. Block, we had said,
9 "Let's streamline the procedure. We don't need additional
10 briefing. We've already briefed this for the hearing
11 officer. Let's just do this within the time period
12 allotted," which is the 60 days. We assumed we had 60
13 days. And, "We won't do any new briefs. We'll just do
14 this on the administrative record."

15 Now, when I said "administrative record," clearly
16 what I meant was the record by the LEA, the documents that
17 were in the LEA's files as well as the materials presented
18 to the hearing officer.

19 When we get to the point of being in front of this
20 board, I am informed, in the staff report, that we are not
21 going to consider anything in the LEA's files, which is
22 not what the agreement was.

23 Nevertheless, that is a digression that we can
24 address in a moment.

25 But back to the record before the hearing officer,

1 on March 19th of this year, there's a letter in the
2 record, from my office, to the LEA, about a half an inch
3 thick, numerous attachments, specifically responding to
4 requests from the LEA in a letter that they wrote to us in
5 February.

6 And then on April 28th, of 2006, Mr. Fishback
7 himself wrote a letter to the LEA and addressed the exact
8 issue that is the question surrounding this engineering
9 report. He was summarizing a telephone conference with
10 Diana Hall of the LEA, and he said to her, "My
11 understanding is you are having trouble understanding my
12 position, because you don't have the engineering reports
13 to determine whether or not we're an engineered fill
14 operation versus a type A registration to your permit."
15 And he says, "I'm going to provide you" -- this letter is
16 in the record. He says, "I'm going to provide you with
17 the engineering reports as well as my consultants'
18 qualifications. And at the bottom of that letter, it
19 says, "Attachments: engineering reports, consultants'
20 reports -- or consultants' resumes."

21 Now, while the letter itself is in the record, the
22 attachments are not. And in fact, there's another letter
23 in the record, dated May 18th, from Fishback to Bill
24 Stratton, memorializing a telephone conference between
25 Stratton and Fishback, during which the contents of the

1 engineering reports were discussed.

2 So clearly, the LEA had the engineering reports.
3 There's no question about it. It should be noted, again,
4 parenthetically, that no one at the LEA has engineering
5 background and no one has ever appeared to review these
6 reports, but they are in the record. And in fact, they
7 are attached to the HECO plan, which is Tab 1 of the
8 materials that we submitted to the hearing officer.

9 Engineering reports clearly provide, no question
10 about it, that the County prepared the record. So instead
11 of providing this information to you, it was omitted, just
12 like the letters to and from Dennis McNulty on the hearing
13 officer issue were admitted from the record. We caught
14 that omission, the omission about the McNulty letters
15 relatively early.

16 That's why it was briefed in the fashion it was
17 and that you had a chance to look at them before this
18 hearing today. We did not catch the omission of the
19 engineering reports until Friday, because that's when we
20 got the staff report.

21 And the staff report echoes the LEA position that
22 Fishback did not provide any further on engineering, which
23 is not true. And in that, we have the testimony of
24 engineer Phil Sherman, in Volume 7. During the second
25 hearing in front of the hearing officer, Mr. Sherman

1 testified for a lengthy time about the work that he had
2 done, beginning in approximately the spring of 2005.

3 Now, under this Public Resources Code,
4 specifically 45032(a), it says, "The evidence before the
5 Board shall consist of the record before the hearing
6 officer, relevant facts as to any actions or inactions not
7 subject to review by the hearing officer, the record
8 before the local enforcement agency, written and oral
9 arguments submitted by the parties, and any other relevant
10 evidence that, in the judgment of the Board, should be
11 considered to effectuate and implement the policies of
12 this division."

13 It is our position that you have the legal right
14 to examine the record below and that is not the truncated
15 version that was presented to you, but rather the real
16 version. We have thought, or had thought, rather naively,
17 I suppose, that the County would provide the engineering
18 reports, and then you would have a chance to review that
19 information.

20 However, the engineering reports were not
21 provided, and then the County informed the LEA -- the
22 state board that the reports were never received.

23 That misinformation was then adopted by the staff.
24 The record was, and is, incomplete. They relied on the
25 County, and now your staff report is inaccurate.

1 In addition, again, things seem to come to light
2 very late in this case. In addition, we are now aware of
3 e-mails between the staff and the public, e-mails that
4 were transmitted within the past couple of weeks. We have
5 gotten them through back channels; we never received them
6 through staff. But we know of one. We need to know if
7 there are others. What has the public been communicating
8 to your staff concerning the project so that we can
9 respond to those e-mails?

10 We need to get the full and accurate
11 administrative record before this body. We would like to
12 have this heard promptly. We wanted to have this heard
13 quickly because of a number of reasons, not the least of
14 which were the statutory deadlines. But going forward, we
15 need to do this thoroughly and without any missing pieces.
16 For that reason, we would waive any deadlines that there
17 are so that we can do this right and have the full
18 administrative record presented to this body and have this
19 heard at a later date.

20 Thank you.

21 And like before, I would like to reserve a little
22 time for rebuttal.

23 CHIEF COUNSEL BLOCK: Just -- Elliot Block for the
24 legal office.

25 Just for purposes of clarification, in terms of

1 tracking through the record, were the engineering reports,
2 the documents you're saying that are not in the record
3 now, were they in front of the hearing officer for his
4 hearing as well, and not brought to us? Or were they not
5 before the hearing officer either?

6 MS. NEISWENDER: The engineering reports were
7 actually included as part of the HECO plan, and they are
8 in the HECO plan, which is in our record before the
9 hearing officer. Clearly there. And I don't have the
10 page citations, but they are in the volume in which my
11 material was presented to the hearing officer, at Tab 1.
12 So yes, he had them in front of him.

13 Furthermore, Mr. Sherman, the civil engineer,
14 testified as to the extent and nature of those engineering
15 reports.

16 CHIEF COUNSEL BLOCK: And are those reports in the
17 record that's before the Board today?

18 MS. NEISWENDER: Yes, sir. I was just trying to
19 tell you where they were; they are in the HECO plan, which
20 is in the record.

21 CHIEF COUNSEL BLOCK: So -- okay.

22 STAFF COUNSEL BLEDSOE: Madam Chair, may I just
23 rise to a point of order.

24 If, while the other presentations are occurring,
25 it would be very helpful, if counsel could find those

1 pages for us so we could all look at that.

2 CHAIRPERSON BROWN: Thank you very much. We would
3 appreciate, while the representative is -- that you could
4 find that part of the record so that we can reference it.

5 MS. NEISWENDER: As I noted previously, I don't
6 have the page cites, but Mr. Bledsoe was kind enough to
7 tell me I could borrow his paginated record. I didn't
8 want to haul everything from Ventura County to Sacramento.

9 MR. KWONG: May I proceed?

10 CHAIRPERSON BROWN: Please. Thank you.

11 MR. KWONG: Madam Chair and members of the Board,
12 coming before you on this third procedural issue, I have
13 to express a bit of surprise and a bit of indignation at
14 the allegations that are being alleged against the County
15 and the production of the administrative record in this
16 case.

17 But we're here because we want to have a fair
18 hearing. And a fair hearing is to have the right things
19 before you. And the right things before you were things
20 that were discussed by myself, Mr. Bledsoe, and
21 Ms. Neiswender at the very beginning of this case.

22 What I would like to do is read to you some
23 correspondence that transpired between myself,
24 Mr. Bledsoe, and Ms. Neiswender with regard to this
25 hearing.

1 This hearing was originally scheduled for
2 January 17th, 2007, next year. But at Mr. Fishback's
3 insistence on having this matter heard as soon as
4 possible, and get it on your docket, because it was such
5 an important issue, we moved, basically, heaven and earth,
6 to get this hearing today.

7 And to do that, we had to make certain concessions
8 and agreements on how the case would proceed. And one of
9 them was with regard to the administrative record and the
10 briefing on this matter.

11 On October 27, 2006, Mr. Bledsoe sent out an
12 e-mail summarizing an agreement that all three of us had.
13 And it states, "Mr. Fishback and Ventura County are
14 willing to waive briefing and submit this matter to the
15 Board on the basis of the administrative record of the
16 proceedings before the Ventura County hearing officer."

17 Now I'm hearing that Mr. Neiswender assumed that
18 it doesn't really say Ventura County hearing officer; it
19 says Ventura County local enforcement agency. It doesn't
20 say that.

21 And to have this different understanding at the
22 11th hour and 58th minute of this hearing is, to me, just
23 a travesty of what administrative hearings are all about.

24 But I'm not going to get too worked up about this
25 issue. I am going to refer, again, to a document that was

1 sent by the County to the Waste Management Board. And it
2 was CC'ed to all the parties, here, indicating that the
3 record was produced and it was being sent up to you.

4 Then there's another letter, dated November 6th,
5 2006, that states, very clearly, that there was an
6 opportunity for both sides, the LEA, as well as the
7 appellant, to advise the Integrated Waste Management Board
8 if there are any corrections or additions that should be
9 made.

10 That letter is dated November 6th. That was a
11 month ago. The letter that you have, which Mr. Block has
12 supplied to all of you, is dated yesterday.

13 We have not had an opportunity to respond to,
14 using the words of my counsel here, "misrepresentations
15 and misstatements" in that letter.

16 That's not fair.

17 The administrative record that you have before you
18 is the administrative record that was before the hearing
19 officer. That was agreed, by stipulation, by all parties,
20 and it's clearly found with -- throughout the record, that
21 that is the agreement.

22 That's why we're not here with another set of
23 briefs. That's why we can be here on an expedited basis.
24 Otherwise, we would be having this hearing in February or
25 March, frankly, given the size of the record that the

1 appellant wants to have at this point in time.

2 Changing positions at this late in the game is not
3 a practice or procedure that ought to be validated or
4 embraced in any way, shape, or form, by this Board.

5 There is no -- the appellant seems to suggest that
6 there's an affirmative duty by the LEA to fill in the
7 blanks that they have created and what they have submitted
8 to not only the hearing officer, but now to this Board.

9 The document that she refers to, in her letter,
10 is -- are documents attached to her appeal from the cease
11 and desist order of the Ventura County Local Enforcement
12 Agency. These are her documents. They are not ours. She
13 submitted them to the hearing officer with the letter
14 dated April 28th, 2006, clearly indicating that Mr.
15 Fishback had enclosures to it. There are no enclosures;
16 there are no attachments. This is her document.

17 Now she's saying, "Hey, it's in the record. You
18 fill in the blanks, because you have it somewhere in your
19 files." That's not the job of the LEA, especially in
20 terms of an administrative adversarial relationship that
21 was before the hearing officer.

22 The job of the LEA is to justify the cease and
23 desist order, not to help the appellant make his case
24 against the LEA. And that's basically what she's saying:
25 "Hey, you have the documents. Help me out here. Give me

1 all the stuff that I think will help my case."

2 That is just simply wrong.

3 Besides the fact that this is a late hit, there is
4 a clear stipulation on record. We, as members of the Bar,
5 attorneys at law, have a code of conduct and ethic to live
6 by those words. And if we stipulate that that is going to
7 be the case, that will be the case. I don't think at this
8 point in time that we can renig on that or find that
9 naivete justifies renigging a stipulation that was very
10 clear on its face.

11 Finally, there are some options. If we go down a
12 particular path -- I don't want to discuss those at this
13 point in time. But I do want to emphasize the fact that
14 the record before you is the record before the hearing
15 officer. And as you -- as we said clearly, on the record
16 today, this is an appeal of the hearing officer's
17 decision.

18 Thank you.

19 CHAIRPERSON BROWN: Thank you, Mr. Kwong.

20 Elliot, you want to cite the page numbers?

21 CHIEF COUNSEL BLOCK: The pages that have been
22 identified in the record are in document number 3, which
23 contains the appellant's brief. And it starts on
24 Page 104. I'm assuming it goes to the end of the section,
25 which would be Page 104 to 118. So that's what's been

1 identified.

2 I do need to ask one more clarifying question,
3 because based on the procedural question we're trying to
4 decide, are these the documents that you are indicating
5 reference other documents that have not been included,
6 or --

7 MS. NEISWENDER: No, these are the engineering
8 reports.

9 CHIEF COUNSEL BLOCK: Are there other documents
10 that have not be included in the record that you are
11 arguing should be included?

12 MS. NEISWENDER: Yes.

13 CHIEF COUNSEL BLOCK: And those are not anywhere
14 here.

15 MS. NEISWENDER: Those are not anywhere there.
16 They are referenced in the letters that I cited to you,
17 dated April 28th, specifically that letter because it
18 specifically references engineering reports and
19 consultants' qualifications.

20 CHIEF COUNSEL BLOCK: Okay. And then the
21 documents that are not included in the record before the
22 Board here today, the attachments that were cited in those
23 letters, were those documents before the hearing officer?

24 MS. NEISWENDER: The engineering reports start at
25 104 of Volume 3. They are buried in the middle of a HECO

1 plan, which is approximately 150 pages long.

2 This is why we assume staff could not locate said
3 reports, because they should have been attached to the
4 letters that I mentioned before.

5 CHIEF COUNSEL BLOCK: And those 150 pages were in
6 front of the hearing officer?

7 MS. NEISWENDER: The hundred -- I'm obviously not
8 being clear. The HECO plan itself is -- that was what was
9 submitted to the Resource and Conservation Division, the
10 RCD of Ventura County. It is a plan which allows for
11 certain erosion control work to take place. This is one
12 of the things we have been arguing about.

13 In the middle of that plan, which is approximately
14 150 pages long, are the engineering reports. And
15 that's -- that's the ones that start at Page 104.

16 So technically, the hearing officer had in front
17 of him engineering reports. That engineering report, that
18 I just mentioned, that's at Page 104, was discussed in
19 depth by Phil Sherman in his testimony of Volume 7, which
20 is in the record; your Volume 7 in your record.

21 What is missing, and what seems to be the problem,
22 is that when the staff went through the -- through the
23 record, they are being told by the County of Ventura that
24 there are no engineering reports -- no engineering
25 reports.

1 Those reports could easily have been located had
2 they been appropriately attached to the letters that had
3 been submitted to the County.

4 Does that make sense now?

5 CHAIRPERSON BROWN: But the documents that you are
6 referencing are Pages 104.

7 MS. NEISWENDER: Some -- some of the documents,
8 yes.

9 CHAIRPERSON BROWN: Were the rest of them part of
10 the hearing record?

11 MS. NEISWENDER: No.

12 CHAIRPERSON BROWN: Then they are not part of this
13 appeal.

14 The basis of your letter is that information that
15 was part of the hearing record has been omitted. You just
16 said that it was not part of the hearing record.

17 MS. NEISWENDER: Because they were not delivered
18 to --

19 CHAIRPERSON BROWN: But you have already agreed --
20 all three of you have agreed to this appeal being based on
21 the record of the hearing panel. That was your agreement
22 with Mr. Block, representative from the LEA, and
23 Mr. Bledsoe. So there's a presumption that you know what
24 is in the hearing record. And if there was documents that
25 were presented and omitted from the hearing record, then

1 you should not have agreed to that being the basis of this
2 hearing.

3 Do you understand --

4 MS. NEISWENDER: I understand.

5 CHAIRPERSON BROWN: -- what I'm saying?

6 MS. NEISWENDER: I understand exactly what you are
7 saying.

8 CHAIRPERSON BROWN: No.

9 MS. NEISWENDER: Well, you're telling me something
10 that I can agree, that I can understand what you are
11 saying. I don't necessarily mean that I agree with it. I
12 do understand it. I don't agree with it.

13 I mean, if I can explain.

14 BOARD CHAIRPERSON BROWN: Sure.

15 MS. NEISWENDER: When we got on the phone and
16 talked about the hearing -- the administrative record for
17 this hearing, we discussed the administrative record as a
18 document, a series of pages that would come out of the
19 County and be transmitted up to this Board.

20 The administrative record, under the APA, and
21 under your own code sections, is that body of information
22 that is included in the LEA's files.

23 Those would include the engineering reports, that
24 I'm discussing, as well as the consultants' qualifications
25 and other documents as well.

1 When we discussed this and said, "It's the
2 administrative record," that's what I assume was being
3 brought up to the LEA -- from the LEA, to the Waste Board.
4 And that's not what was delivered. What was delivered was
5 a very limited subset of documents.

6 And what we have found is that when there are
7 references in -- to the letters sent to Mr. Fishback -- or
8 excuse me, letters received by Mr. Fishback, by the LEA,
9 and included in the record, there are no attachments to
10 those letters.

11 And that's something that, again, was difficult to
12 identify until last week when we got the staff report.

13 CHAIRPERSON BROWN: So do we have a list of the
14 specific documents that are attachments that are not part
15 of the record?

16 MS. NEISWENDER: Consultants' qualifications and
17 engineering reports are the two documents that I was most
18 concerned about.

19 CHAIRPERSON BROWN: Okay. So the engineering
20 reports, though, are Pages 104 to 118.

21 MS. NEISWENDER: We did locate them in the record.

22 CHAIRPERSON BROWN: So the only thing that you are
23 contesting at this point is the attachment with the
24 qualifications was not provided.

25 MS. NEISWENDER: That's correct.

1 CHAIRPERSON BROWN: So at this point, that is the
2 only decision before us, is whether that one document
3 should have been -- was that before the hearing panel?

4 MS. NEISWENDER: No, it was not -- no, that it was
5 not included in the documents delivered to the state
6 Board. And we believe that that --

7 CHAIRPERSON BROWN: Was it part of the record for
8 the hearing panel?

9 MS. NEISWENDER: We believe that it was.

10 CHAIRPERSON BROWN: Was it provided in your
11 material?

12 MS. NEISWENDER: No. It should have been provided
13 as an attachment to the letters that were submitted by the
14 County.

15 CHAIRPERSON BROWN: And my question to you is:
16 Why would you not include qualifications in your materials
17 that were presented? If that was an important document,
18 why would it not have been part of the materials that you
19 prepared?

20 MS. NEISWENDER: Because it wasn't a critical
21 document. We had Mr. Sherman testifying. We had the
22 Board -- excuse me, we had the engineering reports.

23 CHAIRPERSON BROWN: So that's before this -- so
24 that's part of the record of the hearing panel. Does it
25 really need to be an additional document?

1 MS. NEISWENDER: Apparently, as the staff report
2 indicates that it doesn't exist.

3 CHAIRPERSON BROWN: Well, you were contesting the
4 engineering reports. And we've located those in the
5 record.

6 So -- at this point I just want to clarify that
7 for the record: We have the engineering documents. It
8 appears that your concern is, at this point, the
9 qualifications are not part of the documents.

10 And I would like to actually have you -- have you
11 concluded or -- I apologize for interrupting.

12 And I would like to let the LEA representative
13 conclude his comments and then go to Mr. Bledsoe.

14 MR. KWONG: Thank you, Madam Chair.

15 I have concluded my comments. I believe that
16 the -- the recent questioning that you have undertaken of
17 appellant's counsel does clarify things for me, since I
18 was getting a little confused about what was in and what
19 was not.

20 So I had always assumed that she was talking about
21 both, quote, unquote, enclosures to a document she
22 provided to the hearing officer. This is not a document
23 that the County produced. This is her document; it's her
24 responsibility. She failed to put it in. Game over.

25 CHAIRPERSON BROWN: Mr. Bledsoe, your turn.

1 STAFF COUNSEL BLEDSOE: Thank you, Madam Chair.

2 I think what we're seeing here, frankly, is a case
3 of pretty serious revision of history. I believe
4 appellant's counsel is perhaps not remembering what
5 actually happened or just wants to see the facts
6 differently from what they -- what they were.

7 Let me just start, really briefly, with referring
8 again to Public Resources Code Section 45032.

9 And just so that we're all clear, the Board's
10 normal process -- and this is very much not the normal
11 process -- is to base -- hold a hearing with the evidence
12 before it, being the materials, the information, the
13 administrative record, presented at the local level,
14 before the hearing panel or the hearing officer, and other
15 evidence, other relevant evidence that in the judgment of
16 the Board should be considered to effectuate and implement
17 the policies of the Integrated Waste Management. So
18 that's the normal situation.

19 In this case, in an effort to speed this hearing
20 to you, the parties agreed, "Okay. We're just going to
21 hear this matter on the administrative record before the
22 hearing officer."

23 I have no idea what was in Ms. Neiswender's mind
24 at that time, when she agreed to that. But everybody is
25 totally clear, this was supposed to be -- this was to be

1 based on the administrative record before the hearing
2 officer.

3 And the concept that we discussed at that time was
4 maybe -- we didn't end up being able to do this. But
5 maybe we can do this kind of like a summary judgment
6 motion in civil court, where the parties agree to what the
7 facts are, the law is what the law is, then what you argue
8 is how the law applies to your facts, which is -- what I
9 tried to do in the staff report. But we never got to the
10 agreed upon statement of facts.

11 Lest there be any confusion, on November 17, after
12 we had received the administrative record from the local
13 enforcement agency, we put it into -- our staff put it
14 into a PDF format. And I sent it by e-mail to the
15 parties: to the County, and to the appellant. One of the
16 sentences in that e-mail, in addition to saying, "Here
17 comes the administrative record," as Mr. Block noted in
18 his November 9, 2006, letter to you, "Absent written
19 objection from you" -- "Absent written objection from you,
20 you will understand that you have no objection to the
21 record as submitted by the LEA and as formatted by Waste
22 Board staff." We simply put the whole thing in a PDF
23 format to get it on the computers.

24 So you know, I think that it's clear that, you
25 know, the administrative record is whatever was before the

1 hearing officer. And that's what we have provided to you.

2 You know, again, I think we need to look at the
3 evidence here. I'm failing to see any evidence on the
4 part of appellant's counsel that the engineering reports
5 were in the record before the hearing officer. If you
6 look at the materials that they submitted, the HECO plan,
7 that appellant submitted to the hearing officer. This is
8 in document 3. It's as part of the appellant's brief,
9 down below.

10 Number one, I don't think any of us looking at the
11 pages -- Ms. Neiswender just cited Page 104 through 118 --
12 I don't think -- certainly, they did not appear to be
13 engineering reports to me. Then again, I'm not an
14 engineer.

15 More important, since it doesn't matter what my
16 engineering expertise is, here, which is zero, at Page 32
17 of the HECO plan, there is a sentence in here: "Schedule
18 of work is planned to begin June 2006 and be completed in
19 one year."

20 The HECO plan is prospective. It does not apply
21 to the activity for which the local enforcement agency
22 gave the cease and desist order.

23 And I would cite you, again, to Page 83, which is
24 the beginning -- Page 32 is the beginning of the erosion
25 control plan, which is part of the HECO plan. And then

1 Page 83 of the engineering section of the HECO plan,
2 again, that same sentence: "Work is expected to begin in
3 June 2006 and will finish within" -- well, says, "finish
4 with [sic] one year."

5 And in that same paragraph -- I'm reading at the
6 second paragraph on Page 83 -- the paragraph says, before
7 the words I just quoted, "Engineering plan, stamped and
8 signed, are enclosed, reflecting the parcels, drain
9 fields, future fill areas, previous fill areas not a part
10 of this plan, and quantities for each."

11 So to me, the HECO plan applies to some future
12 activity, not to work that had been done in the past, that
13 was the subject of the cease and desist order.

14 And then finally, I have to say, I can understand
15 why counsel, at the hearing officer level, might not have
16 noticed that these materials either were or were not in
17 the record, whatever her final decision is there, but the
18 engineering reports that are so important. At that
19 hearing, their primary argument was that, what the heck
20 that is not, quote, solid waste. This is not, quote,
21 disposal.

22 Our activities are not subject to LEA jurisdiction
23 whatsoever. So who cares if we have engineering reports?

24 The engineering reports, for the Waste Board's
25 purpose, relate only to whether the activity in question

1 is an inert debris engineer fill or another type of inert
2 debris engineer fill activity for which -- which might be
3 excluded. That's why the engineering reports are
4 important. That's why I dwelled on them somewhat in the
5 staff report because while it's clear -- I don't want to
6 get into the merits, but, you know, that is something that
7 would be of interest to you in considering the merits,
8 whether perhaps these people's activities were something
9 that, you know, was exempt from your regulation.

10 Anyway, so my point is that I have no doubt that
11 they did not focus on that because they weren't -- they
12 had no intention of trying to meet one of the exemptions
13 or the notification to your level. They were simply
14 arguing that heck, no, we are not subject to these
15 regulations at all.

16 Thank you very much.

17 CHAIRPERSON BROWN: Thank you.

18 We have two members -- we have two members of the
19 public who would like to provide testimony at this time.

20 First I would like to invite up Robert Mionske. I
21 apologize for mispronouncing your name. Please state your
22 name and spell it for the report.

23 MS. NEISWENDER: Madam Chair, I'm sorry to
24 interrupt. But is this going to be testimony on the item
25 currently before the Board, or on some other item?

1 CHAIRPERSON BROWN: It is testimony from the
2 public on the item that's currently -- that's being taken
3 now. If it is relevant to the item before the Board on
4 this appeal, then it will be considered as such. If not,
5 then it will not be considered as part of this appeal.

6 But in the interest of time, we would like to
7 allow the two people who have come up here to address the
8 Board, to have that opportunity to address the Board.
9 That will be taken under consideration at the proper time.

10 MS. NEISWENDER: We would just like to state for
11 the record that we do object to items being taken out of
12 order like this, because it does make it difficult to go
13 backwards in time, later on, and try to resolve this
14 matter. But with that objection, we can move forward.

15 BOARD CHAIRPERSON BROWN: Thank you.

16 MS. MINER: Good afternoon. My name is Robert
17 Mionske, M-I-O-N-S-K-E. And I live right across the road
18 from the Fishback dump site; and that's down in Simi
19 Valley.

20 And I'm appearing here because I'm kind of, like,
21 what I feel to be kind of like a truth squad for what's
22 really taking place and what has taken place at this site.

23 And one of the things that I would like to address
24 is the reasons for the speed-up of this hearing, that
25 there's a suit -- Wayne Fishback has sued me, Todd

1 Doherty, a few other people, and another 50 DOES with a
2 SLAPP suit in a strategic lawsuit against public
3 participation. I guess that's what it means. And we're
4 doing an anti-slap against him.

5 And the reason for this speed-up, I believe, is
6 that our court date is the 15th of December, this coming
7 up -- a week and a half.

8 And Mr. Fishback would like to have the term
9 "illegal dump" taken off from the records. And he's
10 desperate to be able to try to have leverage over us in
11 that respect, by having that removed. And that's my
12 opinion of why he had this moved up.

13 Then the next thing is that I live right across
14 the street from his site. And I did work for him for the
15 first few years. So I know exactly what he did. And he
16 confided in me why he was doing what he was doing. If you
17 were to see the site today and you were to visit it, like
18 I understand one of the Board members did, you would maybe
19 feel that Mr. Fishback is nothing but a retired architect
20 that wants to have a horse ranch and live on the mountain
21 with his wife and retire.

22 Well, Mr. Fishback tells a real good story. And I
23 actually -- it's good enough that I believe him some of
24 the time. I know the difference, yet I believe what he's
25 saying, he's so convincing. And he's told this story to

1 every agency in Ventura County and the Planning
2 Department, Public Works, Grading, Environmental Health,
3 and Resource Conservation District. One of them, he told
4 he's a rancher, the other one he's told he's an ecologist,
5 and another one he's told, and here, to this Board, he's
6 telling you that he's helping the environment.

7 If you were to believe the story that he tells, he
8 should actually have an award for -- for doing things
9 green. In reality, what he's done is he's made things
10 brown or black. He has really done -- done a disservice
11 to this Board by pretending that he's doing something
12 environmentally sound.

13 And he has run this as a dump. He claims he's
14 never received a penny. And yet the person that works for
15 him has received all of the money underneath the guise of
16 doing tractor work. He isn't being paid anything but
17 doing tractor work.

18 Mr. Fishback -- I paid for the engineering
19 calculations from a professional firm that came up with a
20 figure of 81,000 cubic yards of material that he's brought
21 onto this property, in the approximate last two years.

22 And we're talking about a decent amount of money
23 here. That would be approximately 10,000 truck fulls at
24 \$25. And that would be -- that would be a quarter of a
25 million dollars. And there's a tipping fee, I understand,

1 the way I understand, that he would actually have -- if he
2 was running this dump site legitimately, he would have to
3 be paying a tipping fee. And that would probably be in
4 the 80 of thousands.

5 But thank you for allowing us to come up here and
6 talk before -- because we have a plane that's waiting on
7 us, down there.

8 And we have all kinds of information. I feel that
9 the right way to deal with this thing is to see all of the
10 information that is at hand now. And at the original
11 hearing, there was not anywhere as near the amount of
12 information that we have right now.

13 And thank you very much.

14 CHAIRPERSON BROWN: Thank you very much,
15 Mr. Mionske.

16 The next speaker is Todd Doherty.

17 MR. DOHERTY: Good afternoon. My name is Todd
18 Doherty, D-O-H-E-R-T-Y.

19 And I'm here just to, I guess, just add some
20 clarification to the matter. We have been working on this
21 now for a little over two years. We started to see this
22 procession of dump trucks just going up this little
23 winding road and over and into what's known as Sage Ranch
24 Park, where my family and I like to hike.

25 The volume of trucks was always a lot higher than

1 would be normal or expected in that area. And we called
2 around to the agency and tried to find out what was going
3 on.

4 For a while, Mr. Fishback was able to operate
5 under this, what he cites in his hearing or appellate
6 brief, a verbal okay from the county government.

7 That verbal okay was finally written down, as
8 we've found here just now, the HECO plan, which was
9 approved as of June 6, forward operations.

10 Other agencies in the County -- and you're not
11 able to see this, for this matter. But the EERD, one of
12 the agencies in Ventura County, has called Mr.
13 Fishback's appellate brief inaccurate, convoluted, and
14 nonsensical. The RCD board, this HECO plan that we are
15 all talking about here, has been found to be in
16 substantial noncompliance.

17 The PWA, the Public Works Agency, has issued a
18 stop work order, asking him to cease and desist all
19 dumping operations, all excavating operations.

20 None of that has been done. As of yesterday, as
21 I'm sitting on my porch, I'm watching the dump trucks at
22 Woolsey Canyon Boulevard and into the park and dump upon
23 the property. Because the PWA missed one APN. And
24 therefore, one parcel, Mr. Fishback feels, is still
25 available for dumping on, and he continues to do so.

1 As to the lawsuit he's filed against Robert and I
2 and several other people, one of the reasons he filed that
3 against us is because, as I said, he effectively stole a
4 piece of property. Because right in the center of this
5 dump is a one-acre parcel owned by a 93-year-old woman who
6 lives in Los Angeles.

7 Now, Mr. Fishback says my saying he effectively
8 stole it is wrong. I shouldn't have said that. Now, when
9 she was cited by the PWA for a grading violation on her
10 property, this 93-year-old woman, she clearly wrote back,
11 in her own handwriting, on the violation, "I never gave
12 Mr. Fishback permission to grade or dump on my property."

13 Now, where I was raised, that's akin to stealing.

14 Thank you.

15 CHAIRPERSON BROWN: Thank you very much.

16 Board members have any questions regarding the
17 appeal before us?

18 Mr. Block?

19 CHIEF COUNSEL BLOCK: Just one clarification. You
20 mentioned earlier -- I'm sorry. Ms. Neiswender,
21 Mr. Sherman's testimony in the transcript, I found it in a
22 portion of the first hearing date. Was that the only
23 hearing that he testified at, or did he testify at more
24 than one of the hearing dates?

25 MS. NEISWENDER: He testified during the second

1 hearing. Testimony was approximately -- I think it was,
2 like, 45 minutes' worth, so probably about 20 pages worth
3 of testimony.

4 CHIEF COUNSEL BLOCK: The July 20th hearing?

5 MS. NEISWENDER: That's correct.

6 CHIEF COUNSEL BLOCK: Okay. I've located it, just
7 in case we were wondering.

8 CHAIRPERSON BROWN: Thank you. We will adjourn
9 briefly at 4:05 to closed session, and we will see you all
10 soon.

11 (The Board recessed into closed session.)

12 CHAIRPERSON BROWN: We will reconvene to open
13 session, and I will ask Kristen to call the role.

14 EXECUTIVE ASSISTANT GARNER: Danzinger?

15 MEMBER DANZINGER: Here.

16 EXECUTIVE ASSISTANT GARNER: Mulé?

17 MEMBER MULÉ: Here.

18 EXECUTIVE ASSISTANT GARNER: Peace?

19 MEMBER PEACE: Here.

20 EXECUTIVE ASSISTANT GARNER: Petersen?

21 MEMBER PETERSEN: Here.

22 EXECUTIVE ASSISTANT GARNER: Brown?

23 CHAIRPERSON BROWN: Here.

24 Thank you all for your patience.

25 Regarding the appeal before us, the issue of items

1 identified as not in the record is moot as we've
2 identified the documents in the record, the engineering
3 report; and the reference to qualifications is referenced
4 in the actual testimony of the engineer during the
5 hearing. So no additional records are necessary.

6 And due to the late hour of today and the time
7 necessary to hear the previous appeals that we have been
8 hearing for the last couple of hours, we feel that there
9 is not adequate time to fully hear the merits of the
10 appeal today.

11 Therefore, we have determined that we will
12 continue this hearing to -- tentatively, to January 9th,
13 which is a Tuesday, at 2:00 p.m, And we will confirm that
14 with all parties. And hope that, Mr. Fishback, in the
15 time between now and then, you will comply with the cease
16 and desist order that's been issued by the LEA.

17 And that is it. Thank you all very much. And we
18 will look forward to seeing you on January 9th.

19 MR. KWONG: Thank you very much.

20 STAFF COUNSEL BLEDSOE: Thank you.

21 MS. NEISWENDER: Thank you.

22 (The CIWMB Special Board meeting adjourned

23 at 4:32 p.m.)
24
25

1 CERTIFICATE OF REPORTER

2 I, KATHRYN S. KENYON, a Certified Shorthand Reporter
3 of the State of California, do hereby certify:

4 That I am a disinterested person herein; that the
5 foregoing California Integrated Waste Management Board
6 Special Board Meeting, in the Matter of Wayne Fishback,
7 Appellant, vs. Ventura County Environmental Health
8 Division, Local Enforcement Agency, Respondent, was
9 reported in shorthand by me, Kathryn S. Kenyon, a
10 Certified Shorthand Reporter of the State of California,
11 and thereafter transcribed into typewriting.

12 I further certify that I am not of counsel or
13 attorney for any of the parties to said meeting nor in any
14 way interested in the outcome of said meeting.

15 IN WITNESS WHEREOF, I have hereunto set my hand this
16 14th of December, 2006.

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20

21

22

23 KATHRYN S. KENYON, CSR

24 Certified Shorthand Reporter

25 License No. 13061